

A

MAXLAND SDN BHD

v.

TIMATCH SDN BHD

B

FEDERAL COURT, PUTRAJAYA
 ARIFIN ZAKARIA CJ
 ZULKEFLI MAKINUDIN CJ (MALAYA)
 ABDULL HAMID EMBONG FCJ
 AHMAD MAAROP FCJ

C

ZAINUN ALI FCJ
 [CIVIL APPEAL NO: 02(i)-88-11-2012 (S)]
 24 JULY 2014

D

CIVIL PROCEDURE: Action - Action by writ - Judgment in default - Generally indorsed writ - Generally indorsed writ claiming for damages and restraining order for trespass - Failure to enter appearance in time - Whether plaintiff entitled to enter judgment in default - Whether must serve statement of claim on defendant and proceed with action as if appearance had been duly entered - Judgment obtained before service of statement of claim - Whether liable to be set aside ex debito justitiae - Rules of High Court 1980, O. 13 rr. 1, 2, 3, 4, 6(1) - Scope and effect

E

F

CIVIL PROCEDURE: Writ of summons - Indorsement, general - Generally indorsed writ claiming for damages and restraining order for trespass - Judgment in default - Judgment in default of appearance entered pursuant to O. 13 r. 2 RHC 1980 - Whether flawed - Claim for 'restraining order' - Whether falling outside scope of O. 13 RHC 1980 - Claim for 'damages to be assessed' - Whether mere adjunct to main relief - Abandonment of claim for 'restraining order' - Whether made clear - Whether judgment to be set aside ex debito justitiae - Rules of High Court 1980, O. 13 rr. 1, 2, 3, 4, 6(1)

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I

On 30 December 2010, the plaintiff ('the respondent') took out a generally indorsed writ against the defendant ('the appellant') claiming for damages and a restraining order ('the injunction') for an alleged act of trespass by the defendant. On 29 January 2011, the plaintiff posted the writ at Kota Kinabalu to the defendant's address in Sandakan. It was not in dispute that the dates 3 February 2011 and 4 February 2011 were public holidays for the Chinese New Year festival. Be that as it may, the defendant, who claimed to have received the writ on 8 February 2011, entered appearance on 16 February 2011, at about 2.32pm, at

the High Court Registry, Sandakan. However, on the same day, 16 February 2011, at about 5.12pm, the plaintiff also issued a certificate of non-appearance and then entered a judgment in default against the defendant ('JID'). It was the plaintiff's stand that, bearing in mind, *inter alia*, s. 12 of the Interpretation Acts 1948 and 1967, the defendant was presumed to have received the writ on 2 February 2011, and that being so, the defendant was out of time when it entered appearance only on 16 February 2011, and not within the prescribed 10-day period. Dissatisfied, the defendant applied to set aside the JID, but the application was dismissed by the Judicial Commissioner ('JC') on the ground that the JID was regularly obtained. It was the further view of the JC, in any case, that the defendant had failed to prove that the writ was received by them on 8 February 2011. On appeal, the Court of Appeal affirmed the decision of the JC, holding that the JID was a regular judgment. The defendant contended that on the facts and in the circumstances of this case, the plaintiff was precluded by O. 13 r. 6(1) Rules of the High Court 1980 ('RHC 1980') from entering the JID, and in the event, having successfully applied for leave to appeal to the Federal Court, posed the following questions for consideration, namely: (i) where a writ is indorsed generally with claims for damages and restraining order, whether it is mandatory for the plaintiff to serve a statement of claim on the defendant and to proceed with the action as if the defendant had entered appearance under O. 13 r. 6(1) of the RHC 1980; and (ii) if the answer is in the affirmative, whether a judgment in default of appearance obtained before the statement of claim is served is therefore irregular and may be set aside *ex debito justitiae*. The plaintiff, in retort to these questions, regurgitated that it was entitled to abandon its other claim for injunction and proceed with its claim for unliquidated damages only and enter the JID under O. 13 r. 2 of the RHC 1980.

Held (allowing appeal; answering questions posed in the affirmative)

Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

- (1) In view of the finding of facts made by the JC and affirmed by the Court of Appeal that the defendant had failed to prove that the writ was received by them on 8 February 2011, the defendant was in a weak position to argue again on this issue

- A before this court. It is to be noted, in this respect, that while the presumption of posting was rebuttable, the courts below found on the evidence available that the defendant had not rebutted the presumption. (para 20)
- B (2) The plaintiff had indorsed its writ with a general statement allegedly for trespass against the defendant. The generally indorsed writ showed that they were seeking for a restraining order and damages, whereby by virtue of O. 13 r. 6(1) of the RHC 1980 there is no discretion given to the plaintiff not to
- C serve a statement of claim. Pursuant to O. 13 r. 6(1), it is mandatory for the plaintiff to serve a statement of claim on the defendant and proceed with the action as if the defendant had entered an appearance. This, the plaintiff failed to comply. The JID entered being in breach of O. 13 r. 6(1) of the RHC
- D 1980, it was hence liable to be set aside *ex debito justitiae*. (paras 21, 22 & 25)
- (3) Under O. 13 r. 2 of the RHC 1980, a plaintiff is entitled to enter interlocutory judgment for damages to be assessed in default of appearance where the plaintiff's claim against the
- E defendant is for unliquidated damages only. A plaintiff may similarly enter judgment in default under O. 13 rr. 1, 3, and 4 of the RHC 1980 respectively for a liquidated demand only, for detention of movable property only and for possession of
- F immovable property only. (para 28)
- (4) It is clear that the prerequisite for the operation of O. 13 rr. 1 to 6 of the RHC 1980 is dependent on the type of claims indorsed on the writ by the plaintiff and not on what was subsequently contained in the default judgment. In the
- G present case, the plaintiff entered the JID under O. 13 r. 2 of the RHC 1980 in respect of one of its claims, namely 'damages to be assessed' despite the fact that it had also claimed for a restraining order. It is to be noted that the indorsement on the writ was not for unliquidated damages
- H only. The plaintiff had indorsed its writ with a general statement allegedly for trespass against the defendant, principally claiming for specific relief, namely a restraining order. The claim for general damages was a mere adjunct to the main relief and could not be construed to be an alternative claim.
- I (para 29)

- (5) The present case should be distinguished from *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor*. The decision in *Yap Ke Huat* in respect of O. 13 of the RHC 1980 was based solely on the decision of *Morley London Developments Ltd v. Rightside Properties Ltd* which dealt with a completely different order, namely O. 19 r. 7 of the English Rules of Court in relation to entering of judgment in default of defence whereby a statement of claim had been duly served on the defendant. Further, unlike the plaintiffs in these two authorities, the plaintiff in the present case did not inform either the defendant or the court regarding their abandonment of the claim outside the scope of O. 13 rr. 1 to 4 of the RHC 1980. The plaintiff had not made it clear that the claim for 'restraining order' which was outside the scope of O. 13 rr. 1 to 4 of the RHC 1980 had been abandoned. (paras 30 & 31)

Bahasa Malaysia Translation Of Headnotes

Pada 30 Disember 2010, plaintiff ('responden') telah mengeluarkan satu writ yang diindors secara am terhadap defendan ('perayu') bagi menuntut ganti rugi dan satu perintah halangan ('injunksi') ekoran satu perbuatan ceroboh yang dikatakan dilakukan oleh defendan. Pada 29 Januari 2011, plaintiff mengedpos writ dari Kota Kinabalu ke alamat defendan di Sandakan. Tidak dinafikan bahawa tarikh-tarikh 3 Januari 2011 dan 4 Januari 2011 adalah hari cuti am kerana sambutan Hari Raya Cina. Apapun, defendan, yang mendakwa telah menerima writ pada 8 Februari 2011, memasukkan kehadiran pada 16 Februari 2011, pada jam lebih kurang 2.32 petang, di Pejabat Pendaftaran Mahkamah Tinggi Sandakan. Namun begitu, pada hari yang sama, 16 Februari 2011, pada jam lebih kurang 5.12 petang, plaintiff telah mengeluarkan sijil ketidakhadiran dan kemudian memasukkan satu penghakiman ingkar terhadap defendan ('JID'). Adalah pendirian plaintiff bahawa mengambil kira, antara lain, peruntukan s. 12 Akta Tafsiran 1948 dan 1967, defendan dianggap telah menerima writ pada 2 Januari 2011, dan oleh kerana itu, defendan adalah di luar masa apabila hanya memasukkan kehadiran pada 16 Februari 2011, dan tidak dalam tempoh sepuluh hari seperti yang ditetapkan. Tidak berpuas hati, defendan memohon untuk mengenyepikan JID tetapi permohonannya telah ditolak oleh Pesuruhjaya Kehakiman ('PK'), atas alasan bahawa JID telah diperoleh secara teratur. Di samping

- A itu, PK juga berpandangan bahawa defendan gagal membuktikan bahawa writ hanya diterima olehnya pada 8 Februari 2011. Atas rayuan, Mahkamah Rayuan mengesahkan keputusan PK, dengan memutuskan bahawa JID adalah satu penghakiman yang teratur.
- B Defendan mengatakan bahawa berdasarkan fakta dan hal keadaan kes, plaintif adalah dihalang oleh perbahasaan A. 13 k. 6(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') dari memasukkan JID, dan oleh yang demikian, setelah berjaya mendapat kebenaran merayu ke Mahkamah Persekutuan, mengemukakan persoalan-persoalan berikut untuk pertimbangan
- C iaitu: (i) di mana suatu writ diindors secara am bagi mendapatkan ganti rugi dan perintah halangan, sama ada wajib bagi plaintif untuk menyerahkan pernyataan tuntutan kepada defendan dan meneruskan dengan tindakannya seolah-olah defendan telah memasukkan kehadiran di bawah A. 13 k. 6(1) KMT 1980; dan
- D (ii) jika jawapan kepada persoalan adalah afirmatif, sama ada suatu penghakiman ingkar kehadiran yang diperolehi sebelum pernyataan tuntutan diserahkan adalah tidak teratur dan dengan itu boleh diketepikan *ex debito justitiae*. Plaintif, dalam hujahannya terhadap
- E dua persoalan ini, mengatakan bahawa ia berhak untuk meninggalkan tuntutan injunksinya yang satu lagi dan hanya meneruskan dengan tuntutan untuk ganti rugi jumlah tidak tertentunya dan seterusnya memasukkan JID di bawah A. 13 k. 2 KMT 1980.
- F **Diputuskan (membenarkan rayuan; menjawab persoalan secara afirmatif)**
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:
- G (1) Mengambil kira dapatan fakta yang dibuat oleh PK yang disahkan oleh Mahkamah Rayuan bahawa defendan gagal membuktikan bahawa ia menerima writ pada 8 Februari 2011, defendan berada dalam keadaan yang lemah untuk menghujah kembali persoalan yang sama di mahkamah ini. Harus diingat,
- H dalam hubungan ini, bahawa sementara anggapan pengeposan boleh dipatahkan, mahkamah-mahkamah di bawah mendapati berdasarkan keterangan yang ada di hadapan mereka bahawa defendan gagal mematahkan anggapan tersebut.
- I (2) Plaintif telah mengindors writnya dengan pernyataan umum untuk tindakan ceroboh terhadap defendan. Writ yang diindors secara umum tersebut menunjukkan plaintif memohon untuk

- perintah halangan dan ganti rugi, dan berdasarkan A. 13 k. 6(1) KMT 1980, tiada budibicara untuk plaintif tidak menyerahkan pernyataan tuntutan. Di bawah A. 13 k. 6(1) KMT 1980, adalah mandatori bagi plaintif menyerahkan pernyataan tuntutan ke atas defendan dan meneruskan dengan tindakan seolah-olah defendan telah memasukkan kehadiran. Ini tidak dipatuhi oleh plaintif. Oleh kerana JID dimasukkan dengan melanggar A. 13 k. 6(1) KMT 1980, maka ia boleh diketepikan *ex debito justitiae*. A B
- (3) Di bawah A. 13 k. 2 KMT 1980, seorang plaintif berhak untuk memasukkan penghakiman interlokutori untuk ganti rugi yang perlu dinilai disebabkan ingkar kehadiran jika tuntutannya adalah semata-mata untuk ganti rugi bagi jumlah yang tidak ditentukan. Begitu juga, seorang plaintif boleh memasukkan penghakiman ingkar di bawah A. 13 kk. 1, 3 dan 4 KMT 1980 masing-masing bagi tuntutan jumlah tertentu semata-mata, bagi penahanan harta tak alih semata-mata dan bagi milikan harta tak alih semata-mata. C D
- (4) Adalah jelas bahawa syarat duluan bagi pemakaian A. 13 kk. 1 hingga 6 KMT 1980 adalah bergantung kepada jenis tuntutan plaintif seperti yang terdapat di dalam writ dan bukannya atas apa yang terkandung kemudiannya di dalam penghakiman ingkar. Dalam kes ini, plaintif memasukkan JID di bawah A. 13 k. 2 KMT 1980 berkaitan dengan salah satu dari tuntutannya, iaitu 'gantirugi yang perlu dinilai' walaupun ia juga ada memohon untuk perintah halangan. Perlu diperhatikan bahawa indorsmen pada writ adalah bukan untuk ganti rugi jumlah tidak tertentu semata-mata. Plaintif telah mengindorskan writnya dengan kenyataan am untuk ceroboh terhadap defendan, secara penting menuntut relif tertentu, iaitu perintah halangan. Tuntutan bagi ganti rugi am hanyalah suatu tempelan kepada relif utama dan tidak boleh ditafsirkan sebagai satu tuntutan alternatif. E F G
- (5) Kes semasa harus dibezakan dari kes *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor*. Keputusan di dalam *Yap Ke Huat* berkaitan A. 13 KMT 1980 adalah berdasarkan keputusan kes *Morley London Developments Ltd v. Rightside Properties Ltd* yang menangani aturan yang berlainan sama sekali, iaitu A. 19 k. 7 Kaedah-Kaedah Mahkamah Inggeris berhubung dengan memasukkan H I

- A penghakiman ingkar di mana pernyataan tuntutan telah diserahkan dengan sempurnanya ke atas defendan. Selain itu, tidak seperti plaintif-plaintif dalam kedua-dua kes tersebut, plaintif di sini tidak memberitahu defendan mahupun mahkamah mengenai tindakannya untuk meninggalkan tuntutan yang
- B terkeluar dari skop A. 13 kk. 1 hingga 4 KMT 1980. Plaintif tidak membuatnya jelas bahawa tuntutan untuk ‘perintah tahanan’ yang berada di luar skop A. 13 kk. 1 hingga 4 KMT 1980 telah ditinggalkan.

C **Case(s) referred to:**

- Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors* [1987] 1 LNS 70 HC (**refd**)
- Badrul Zaman PS Md Zakariah v. Tamil Nesan (M) Sdn Bhd & Ors* [2002] 8 CLJ 86 HC (**aff**)
- Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 FC (**refd**)
- D *Morley London Developments Ltd v. Rightside Properties Ltd* [1973] 231 EG 235 (**dist**)
- Pengkalan Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326 HC (**refd**)
- E *Taman Pangkor Sdn Bhd v. Doric Development Sdn Bhd & Ors* [1987] 2 CLJ 266; [1987] CLJ (Rep) 1008 HC (**refd**)
- Tan Tin Swee v. Kangar Properties Sdn Bhd* [1990] 2 CLJ 457; [1990] 3 CLJ (Rep) 199 HC (**refd**)
- Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 FC (**refd**)
- F *White v. Weston* [1968] 2 All ER 842 CA (**refd**)
- Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175 CA (**dist**)

Legislation referred to:

- G Advocates (Practice and Etiquette) Rules 1988, r. 56
- Interpretation Acts 1948 and 1967, s. 12
- Rules of the High Court 1980, O. 13 rr. 1, 2, 3, 4, 5, 6(1)
- Rules of Court [UK], O. 19 rr. 3, 7
- H *For the appellant - Jeyan Marimuttu (Chang Yaw Chung with him); M/s J Marimuttu & Partners (Sandakan)*
- For the respondent - David Fung (Syarulnizam Salleh with him); M/s Alex Pang & Co*

Reported by Wan Sharif Ahmad

I

JUDGMENT

A

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellant against the whole decision of the Court of Appeal in dismissing the appellant's appeal against the decision of the High Court at Sandakan. The High Court had dismissed the appellant's application to set aside the certificate of non-appearance dated 16 February 2011 and the judgment in default of appearance ("JID") entered by the respondent against the appellant and for the appellant to be granted leave to file and serve its statement of defence within two weeks from the date that the statement of claim is served on them and for a further order that the hearing for assessment of damages be set aside. The appellant was the defendant and the respondent was the plaintiff before the High Court. For convenience the parties will be referred to as they were before the High Court.

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Leave To Appeal

[2] This court granted leave to the defendant to appeal against the decision of the Court of Appeal on the following two questions of law:

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- (1) Where a writ is indorsed generally with claims for damages and restraining order, whether it is mandatory for the plaintiff to serve a statement of claim on the defendant and to proceed with the action as if the defendant had entered an appearance under O. 13 r. 6(1) of the Rules of the High Court 1980 ("RHC 1980").

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- (2) If the answer is in the affirmative, whether a judgment in default of appearance obtained before the statement of claim is served is therefore irregular and may be set aside *ex debito justitiae*.

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Background Facts

H

[3] The sequence of dates is relevant and of importance in this appeal. The relevant background facts in accordance with the sequence of dates are these:

I

A [4] On 30 December 2010 the plaintiff took out a generally
indorsed writ against the defendant claiming for damages and a
restraining order (injunction) arising out of the defendant's
wrongful action in trespass. It was alleged that the defendant had
intentionally or negligently injured the raw water transmission
B pipeline and valve chamber along Jalan Ulu Sibuga in the district
of Sandakan which was used and maintained by the plaintiff for
the supply of water to its treatment plant. On 29 January 2011
the plaintiff posted the writ on Saturday at Kota Kinabalu to the
defendant's address in Sandakan. The dates, 3 February 2011 and
C 4 February 2011 were public holidays in view of the Chinese New
Year Festival.

[5] The defendant claimed that on 8 February 2011 after the
Chinese New Year Festival on or about Tuesday, the defendant
received by mail the said writ. On 9 February 2011 the defendant
D by a letter dated 9 February 2011 instructed the defendant's
solicitors to defend the action herein. On 16 February 2011 at
about 2.32pm the defendant by a memorandum of appearance
entered appearance at the High Court Registry at Sandakan. A
E copy of the same was also served on the plaintiff's solicitors by
way of fax and courier.

[6] On 16 February 2011 at about 5.12pm the certificate of
non-appearance was issued by the plaintiff and pursuant to the
certificate of non-appearance the said JID was entered. On
F 28 February 2011 the defendant received by mail a letter dated
22 February 2011 from Messrs Alex Pang & Co, the plaintiff's
solicitors enclosing a copy of the said JID dated 16 February
2011. On 1 March 2011 the defendant's solicitors by a letter
G dated 1 March 2011 applied to conduct a file search at the
Registry of the High Court at Sandakan.

[7] On 3 March 2011 the defendant's solicitors received a
notice of hearing dated 2 March 2011 from the High Court at
Sandakan stating that the matter herein had been set down for
H assessment of damages on 12 and 13 April 2011. Upon receiving
the said notice of hearing the defendant's solicitors applied for
notes of proceedings of the case to be provided by the High
Court to find out the circumstances under which the hearing of
the assessment of damages was fixed.

I

[8] On 11 March 2011 the defendant immediately filed an application to set aside the said JID dated 16 February 2011, the certificate of non-appearance dated 16 February 2011 and the hearing of the assessment of damages. On 3 June 2011 the defendant's application to set aside the said JID came up for hearing before the learned Judicial Commissioner of the High Court who dismissed the defendant's application.

Findings Of The High Court

[9] The learned Judicial Commissioner of the High Court in dismissing the defendant's application to set aside the JID grounded his decision on the grounds which can be summarised as follows:

- (1) The JID entered was a regular judgment. The defendant was late in entering appearance on the 16 February 2012. Once the writ of summons was posted to the defendant's registered address it became *prima facie* evidence that the documents were duly served after the relevant period of time prescribed by law for service of the writ. Accordingly, the said writ of summons posted by the plaintiff on the 29 January 2011 and after five days thereof was deemed to be served pursuant to s. 12 of the Interpretation Act 1967. Thus, the defendant was deemed to have received the writ on the 2 February 2011 and the time limit for the defendant to enter appearance would be on the 11 February 2011.
- (2) The defendant had failed to prove that the writ was received by them on the 8 February 2011. The onus of proving the same was on them by production of the post receipt or slip issued by the relevant post office. (See *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175; [2008] 5 MLJ 112 and *Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326).
- (3) The memorandum of appearance filed by the defendant's solicitors was defective as it only had the defendant's solicitor's signature and seal without the official court stamp that would have indicated the date the appearance was entered and recorded in the official court cause book.

- A (4) The plaintiff was not in breach of r. 56 of the Advocates (Practice and Etiquette) Rules 1988 (“Rules 1988”). The defendant was not represented, hence there was no solicitors on record to give the relevant notice of the purported JID that was going to be entered. Moreover r. 56 of the Rules
- B 1988 is a rule regulating the personal relationship in the legal profession and is not a substantive rule of law to be complied with. (See *Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors* [1987] 1 LNS 70; [1988] 1 MLJ 33).
- C (5) The defendant had failed to show they have a *bona fide* defence on the merits.
- D (6) The plaintiff’s generally endorsed writ of summons sufficiently sets out the plaintiff’s claim against the defendant. The defendant’s contention that the plaintiff’s concise statement endorsed in the writ which failed to give the relevant and sufficient particulars as to the true nature of its claim was totally misconceived.

E **Findings Of The Court Of Appeal**

[10] The Court of Appeal affirmed the decision of the learned Judicial Commissioner of the High Court and in its decision *inter alia* stated as follows:

- F We find that the JID entered on the 16 February 2011 was a regular judgment. The learned Judicial Commissioner was correct in his findings that the defendant was late in entering its appearance as based on the *prima facie* presumption the writ which
- G was posted on the 29 January 2011 would have reached the defendant by the 2 February 2011. Under O. 12 r. 4 of the RHC, the time limited for the defendant to enter its appearance is ten days after the writ of summons is served (including the day of service). Under section 12 of the Interpretation Act 1967 service of a particular document by post shall be presumed to have been affected at the time when the letter would have been
- H delivered in the ordinary course of post. Based on this presumption, the writ of summons posted by the plaintiff *via* registered post on the 29 January 2011 was deemed to have reached the defendant on 2 February 2011. Accordingly, the appearance should have been entered on or before the
- I 11 February 2011. The presumption of posting is a *prima facie* evidence that a particular document is served after the relevant

period of time. This presumption is rebuttable. The issue on presumption of posting of a writ was duly addressed in the case of *Yap Ke Heat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor (supra)* wherein His Lordship James Foong, JCA (as he then was) remarked the following:

Once the writ and statement of claim are sent by AR registered post, it is *prima facie* proof of service unless the defendant is able to rebut this.

We accept the foregoing statement as a correct statement of law and we have no reasons to depart from the same.

Submission Of The Defendant

[11] Learned counsel for the defendant in his submission on the two questions of law posed, impressed upon this court to consider the effect and application of O. 13 r. 6(1) of the RHC 1980 to the facts and circumstances of this case under which the JID was entered by the plaintiff against the defendant. Essentially it is the defendant's case that the effect of O. 13 r. 6(1) of the RHC 1980 is to preclude a plaintiff from entering judgment in default of appearance in every case in which the indorsement of the writ contains a claim which is not squarely within rr. 1 to 4 of O. 13 of the RHC 1980 notwithstanding the fact that the defendant has not entered appearance. It requires the plaintiff to serve a statement of claim on the defendant and proceed with the action as if that defendant had entered appearance.

[12] It is the contention of the defendant that O. 13 rr. 1 to 4 of the RHC 1980 concerns respectively claims for liquidated demand, claim for unliquidated damages, claim relating to detention of moveable property and claim for possession of immovable property only. As such, if there is indorsed on the writ a claim for an account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in O. 13 rr. 1 to 4 of the RHC 1980, the plaintiff cannot enter judgment in default of appearance.

[13] For the defendant it was also argued that the said JID was irregular and was entered prematurely when in fact the defendant had duly entered its appearance by way of a memorandum of appearance at the registry of the High Court at Sandakan on 16 February 2011 and a copy of the same had been served on the plaintiff's solicitors within the time limited for entering an

- A appearance which only expired on 17 February 2011. The defendant contended that it only received the writ on or about the 8 February 2011 and therefore would have ten days until 17 February 2011 to enter appearance at the Registry of the High Court at Sandakan and which the defendant had duly done by a
- B memorandum of appearance entered in the registry on 16 February 2011 at 2.32pm.

- C [14] The said JID was entered purportedly in reliance of a certificate of non-appearance which was issued on 16 February 2011 at 5.12pm after the defendant had duly entered appearance at the registry. Thereafter, the said JID was only given or made and entered on 16 February 2011 at 5.15pm.

- D [15] Learned counsel for the defendant further submitted that taking into consideration the sequence of the documents filed in court by the respective parties, it is clear that the defendant had entered its memorandum of appearance prior to the filing and sealing of the purported JID. The case of *Tan Tin Swee v. Kangar Properties Sdn Bhd* [1990] 2 CLJ 457; [1990] 3 CLJ (Rep) 199 was cited to support the defendant's contention that the court
- E can set aside the JID on the ground that the same was premature and irregular.

Submission Of The Plaintiff

- F [16] As regards the two questions of law posed for the determination of this court learned counsel for the plaintiff submitted amongst others that the issue to be decided in this case depends on whether the plaintiff wished to pursue the claim for an injunction or not. It was contended that if the plaintiff wished
- G to pursue the claim for an injunction, which was a specific relief granted under equity it would have to proceed under O. 13 r. 6(1) of the RHC 1980 and comply with the requirements of serving the statement of claim and then proceeding by summons for leave to enter judgment for the injunction.
- H [17] It was however contended for the plaintiff in this case that it wished to pursue its claim for unliquidated damages only. Therefore it could enter interlocutory judgment against the defendant for damages to be assessed and costs under O. 13 r. 2 of the RHC 1980, and O. 13 r. 6(1) of the RHC 1980 had no
- I

application to the plaintiff's case. By confining to the claim for unliquidated damages to be assessed and costs in the JID, the plaintiff had expressly elected to abandon its claim for an injunction which was a claim intended to be covered under O. 13 r. 6(1) of the RHC 1980. The two cases of *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor (supra)* and *Morley London Developments Ltd v. Rightside Properties Ltd* [1973] 231 EG 235 were cited by the plaintiff to support its contention.

[18] On the issue as to whether the JID was entered regularly learned counsel for the plaintiff in reply submitted that the writ was served by registered post. It was posted on 29 January 2011 as shown in the post office slip proving the posting on 29 January 2011. After taking five days for the ordinary post to deliver, the writ was deemed served on 2 February 2011. The time limit for the defendant to enter appearance being ten days including the day of service was 11 February 2011. The defendant had failed to adduce evidence to rebut the presumption of service by failing to produce objective or independent evidence of the post receipt or slip to prove that the writ was received on the date it claimed on 8 February 2011. The only evidence the defendant produced was its own self-serving statement that the defendant received it on that date.

Decision Of This Court

[19] We shall first deal with the contention of the defendant that it had duly entered its appearance within the time limited for entering an appearance which only expired on 17 February 2011. The defendant contended the said JID was irregular and was entered pre-maturely when in fact the defendant had duly entered its appearance by way of memorandum of appearance at the registry of the High Court at Sandakan on 16 February 2011. The defendant claimed that it only received the writ on or about 8 February 2011 and therefore would have ten days until 17 February 2011 to enter appearance.

[20] With respect to the above contention of the defendant in view of the finding of facts made by the learned Judicial Commissioner of the High Court and affirmed by the Court of Appeal that the defendant had failed to prove that the writ was

A received by them on 8 February 2011, it is our considered view
that the defendant is in a weak position to argue again on this
issue before this court. It is a settled principle of law that an
appellate court would be slow in interfering with the finding of
facts and decision made by the trial Judge unless the said decision
B can be said to be plainly wrong. It is the plaintiff's case that the
defendant was late in entering its appearance based on the *prima*
facie presumption that the writ was posted on 29 January 2011
and would have reached the defendant by the 2 February 2011.
The presumption of posting was rebuttable but the Courts below
C found on the evidence available that the defendant had not
rebutted this presumption. (See the case of *Yap Ke Huat & Ors*
v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor (supra)).

D [21] We shall now deal with the two questions of law posed for
the determination of this court. In the present case the plaintiff
had indorsed its writ with a general statement allegedly for
trespass against the defendant. The plaintiff's generally indorsed
writ shows that they are seeking for a restraining order and
damages, and by virtue of O. 13 r. 6(1) of the RHC 1980 there
E is no discretion given to the plaintiff not to serve a statement of
claim.

F [22] Pursuant to O. 13 r. 6(1) of the RHC 1980, it is mandatory
for the plaintiff to serve a statement of claim on the defendant and
proceed with the action as if the defendant had entered an
appearance. This, the plaintiff had failed to comply. Order 13
r. 6(1) of the RHC 1980 provides as follows:

G 6(1) Where a writ is indorsed with a claim of a description not
mentioned in rules 1 to 4, then if any defendant fails to enter an
appearance, the plaintiff may, after the time limited for appearing
and upon filing an affidavit proving due service of the writ on that
defendant and, where the statement of claim was not indorsed on
or served with the writ, upon serving statement of claim on him,
proceed with the action as if that defendant had entered
H appearance.

I [23] The case on point in respect of application of O. 13 r. 6(1)
of the RHC 1980 is *Lai Yoke Ngan & Anor v. Chin Teck Kwee &*
Anor [1997] 3 CLJ 305; [1997] 2 MLJ 565 wherein the appellants
(plaintiffs) caused to be issued a writ against the respondents (the
defendants) on which there was indorsed besides a claim for

several declarations and injunctions there was also a claim for damages. The plaintiffs obtained default judgment. The defendants entered appearance and took out a summons by which they sought to set aside only so much of the order as directed on assessment of damages. This was followed by a second summons dated 1 April 1992, by which the defendants applied to have the writ struck out on the ground that the indorsement upon it did not disclose any cause of action. Subsequently, upon hearing both the summonses, the learned judge set aside the whole of the JID and he also struck out the writ. The plaintiffs appealed against the orders, setting aside the judgment in default (the first appeal) and striking out of the writ (the second appeal). The Federal Court dismissed the first appeal but allowed the second appeal. His Lordship Mohd Azmi FCJ had this to say (headnote):

On the facts, it was clear that the judgment in default (the subject matter of the first appeal) was irregular for non-compliance with the RHC – in particular O 13 r 6(1) – by failing to serve a statement of claim on the defendants. On this ground alone, the entire judgment in default ought to be set aside. There can be no dispute that the procedural irregularity in the failure to serve the statement of claim on the defendants before the judgment in default was entered, just as the order to assess damages in the absence of judgment granting damages, had prejudiced the defendants and therefore beyond curability.

His Lordship Gopal Sri Ram JCA (as he then was) in the same case at p. 580 C-G observed as follows:

Taking the first argument, it is beyond dispute that the plaintiffs, by the indorsement to the writ, principally claimed specific relief. The claim for general damages was a mere adjunct to the main relief. The defendants admittedly did not enter an appearance to the writ. But did that entitle the plaintiffs to enter judgment in default in the form in which they did? The answer to that question must, I think, be derived from the relevant rule of court that governs a case such as the present. It is common ground that that rule is O. 13 r. 6(1) ...

The wording of the rule makes it plain that, in the present case, the plaintiffs were clearly not entitled to enter judgment in the form in which they did. Since the conditions precedent prescribed by O. 13 r. 6(1) were absent, the judgment entered against the defendants was irregular and was therefore liable to be set aside.

A [24] Still on the application of O. 13 r. 6(1) of the RHC 1980, in the case of *Taman Pangkor Sdn Bhd v. Doric Development Sdn Bhd & Ors* [1987] 2 CLJ 266; [1987] CLJ (Rep) 1008, Peh Swee Chin J (as he then was) at p. 1009 observed as follows:

B It is clear from O. 13 rr. 1 to 6, of the Rules of the High Court that the prayers (1), (2) and (3) of the statement of claim as set out above, were not of the description mentioned in O. 13 rr. 1 to 5, but fitted in squarely with O. 13 r. 6(1) so that the plaintiff would be precluded from entering judgment for default of appearance forthwith, and would be, notwithstanding the non-appearance, required to proceed with the action as if the defendant had entered an appearance.

D [25] We are of the view, clearly, the said JID entered in the present case is in breach of the terms of O. 13 r. 6(1) of the RHC 1980 and that it may be set aside *ex debito justitiae*. This is because in the first place the plaintiff should not have entered the irregular judgment and it should not be allowed to take advantage of its own non-compliance of the rules. On this point useful reference can be made to the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30 FC wherein the Federal Court held that:

F It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity. The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms.

G [26] We would also refer to the case of *White v. Weston* [1968] 2 All ER 842 CA wherein the English Court of Appeal held that a judgment should be set aside unconditionally *ex debito justitiae* because it was a plain case of the defendant being totally unaware of the proceedings at all. Russell LJ said this at p. 846:

I There has in the past been much discussion whether a judgment is a nullity or a mere irregularity, and for the cases on the subject I may perhaps refer to *Re Pritchard (decd)* [1963] 1 All ER 873; [1963] Ch. 502, where they were discussed. Upjohn LJ in that case expressly stated at pages 882-883; at pages 523-524 to be a nullity proceedings which ought to have been served, but have

never come to the notice of the defendant at all, excluding, of course, cases of substituted service, service by filing in default, or cases where service has properly been dispensed with. Danckwerts LJ adopted that judgment. I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as 'irregular' or 'a nullity'. The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment: '... in accordance with settled practice, the court can exercise its discretion only in one way, namely, by granting the order sought', to quote Upjohn LJ in *Re Pritchard (decd)* [1963] Ch 502 at page 521.

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[27] Learned counsel for the plaintiff argued that it was entitled to abandon its other claim for injunction and proceeds with its claims for unliquidated damages only and enter the said JID under O. 13 r. 2 of the RHC 1980. Under O. 13 r. 2 of the RHC 1980, it provides:

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Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

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[28] With respect to the above contention of the plaintiff we are of the view under O. 13 r. 2 of the RHC 1980, a plaintiff is entitled to enter interlocutory judgment for damages to be assessed in default of appearance where the plaintiff's claim against a defendant is for unliquidated damages only. A plaintiff may similarly enter judgment in default under rr. 1, 3 and 4 of O. 13 of the RHC 1980 respectively for a liquidated demand only, for detention of moveable property only and for possession of immovable property only.

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[29] It is clear that the pre-requisite for the operation of O. 13 rr. 1 to 6 of the RHC 1980 is dependent on the type of claims indorsed in the writ by the plaintiff and not on what was subsequently contained in the default judgment. In the present case, the plaintiff entered the said JID under O. 13 r. 2 of the RHC 1980 in respect of one of its claims, namely "damages to be assessed" despite the fact that it had also claimed for a restraining

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- A order. It is noted that the indorsement on the writ was not for
unliquidated damages only. The plaintiff had indorsed its writ with
a general statement allegedly for trespass against the defendant,
principally claiming for specific relief, namely, a restraining order.
The claim for general damages was a mere adjunct to the main
B relief and cannot be construed to be an alternative claim.

- [30] The plaintiff purported to rely on the Court of Appeal's
judgment in the case of *Yap Ke Huat Ors v. Pembangunan Warisan*
Murni Sejahtera Sdn Bhd & Anor (supra) and contended that it
C could abandon its other claim and confined its claim for
unliquidated damages to be assessed only. We are of the view the
decision of *Yap Ke Huat* is distinguishable on the facts and has
no application to the present case. In *Yap Ke Huat* the statement
of claim had been duly served on the defendant unlike in the
D present use. The decision in *Yap Ke Huat* in respect of O. 13
of the RHC 1980 was based solely on the decision of *Morley London*
Developments Ltd v. Rightside Properties Ltd (supra) which dealt with
a completely different order, namely O. 19 rr. 3 and 7 of the
English Rules of Court in relation to entering of judgment in
E default of defence whereby a statement of claim had been duly
served on the defendant.

- [31] Another distinguishing feature in *Yap Ke Huat* and *Morley*
London Developments Ltd is that the plaintiffs in the said two cases
F had clearly indicated their intention of abandoning the prayer for
specific performance to the defendant and the court prior to the
entering of the default judgment of defence. However, the plaintiff
in the present case did not inform either the defendant or the
court regarding their abandonment of claim outside the scope of
O. 13 rr. 1 to 4 of the RHC 1980. The plaintiff has failed to
G make it clear that the claim for "restraining order" which was
outside the scope of O. 13 rr. 1 to 4 of the RHC 1980 has been
abandoned.

- [32] A local case directly on point to show that the plaintiff has
H to make an election informing the court that it was abandoning the
relief for injunction and proceeding only on other relief is the case
of *Badrul Zaman PS Md Zakariah v. Tamil Nesan (M) Sdn Bhd &*
Ors [2002] 8 CLJ 86; [2001] 4 MLJ 403 HC. In this case the
subject matter of the appeal concerned an alleged act of
I defamation by the first defendant against the plaintiff and among

the reliefs sought by the plaintiff were an injunction and general damages. The plaintiff entered default judgment for general damages to be assessed. His Lordship PS Gill J (as he then was) in setting aside the default judgment had this to say at p. 408 C-H:

With respect to the case at hand, I tend to agree with the submission of Dr. Cyrus Das that the plaintiff had short circuited the whole process involved in O. 13 r. 6 of the RHC, and proceeded in unholy haste to enter judgment on 30 May 2001. The plaintiff did not appreciate the fact that a notice of motion should have been filed in view of the reliefs that he had prayed for, before a judgment is entered into. The plaintiff's counsel, Mr. Manoharan, on realizing his blunder, and in order to salvage the judgment, immediately informed the court at the hearing of the appeal, that he was abandoning the relief for injunction, and was proceeding purely on the other reliefs. To this sudden turn of events, I have my reservations as to whether the plaintiff is entitled, at this point of time, to make this election.

I am cognizant of the fact that the plaintiff is free to elect which relief he wants to pursue, and he is under no duty to give notice of this election to abandon any form of relief, which he originally claimed, and on effective abandonment of every remedy or relief outside the description in sub-rules (1) to (4), he is entitled to a judgment under these Rules (Please see *Morley London Developments Ltd v. Rightside Properties Ltd* (1973) 117 SJ 876 (CA)).

But from my understanding and reading of this authority, *the effective abandonment of the said reliefs should be done before the said judgment is entered into, and not, after the judgment has been entered, and perfected. The conduct of the plaintiff's counsel presently in requesting the abandonment of the said reliefs to use a proverbial phrase, amounts to 'closing the stable door, after the horse has bolted'. I could not at this stage allow such an abandonment, more especially when the said judgment is now being castigated for this very reason. Viewed dispassionately, and bearing in mind the dicta of Gopal Sri Ram JCA in Lai Yoke Ngan, I am convinced that the judgment in default entered on 30 May 2001 is irregular.* (emphasis added)

Conclusion

[33] For the reasons abovestated we would answer questions 1 and 2 posed in this appeal in the affirmative. The appeal is therefore allowed with costs here and in the courts below.